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[*Kang v. Dept. of Veterans Affairs Medical Center*](#), 92-ERA-31 (ALJ Mar. 31, 1993)

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U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE ISSUED: MAR 31 1993
CASE No.: 92-ERA-31

In the Matter of

SIMKEON KANG, M.D.
Complainant,

v.

DEPARTMENT OF VETERANS
AFFAIRS MEDICAL CENTER
Respondent,

ROBERT BOGAN, Esq.
For the Complainant

JOHN C. DI NOTO, Esq.
For the Respondent

Before: AARON SILVERMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Proceeding under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851, and implementing regulations at 29 C.F.R. Part 24 (1990).

The Act prohibits covered employers from discriminating against any employee with respect to terms, conditions, or privileges of employment because the employee assisted or is about to assist in any action to carry out the purposes of the Act or the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011. Protected activities are popularly referred to as "whistleblowing."

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All references to the hearing in this decision and order are to the one held by the undersigned in Albany, N.Y. in July 1992.

In a complaint filed December 24, 1991¹ with the U.S. Department of Labor (DOL), Simkeon Hang, M.D., the Complainant, alleged first that he was removed as Chief of Nuclear Medicine, and then terminated from employment as a part-time physician by the Respondent, the Department of Veterans Affairs (VA), at its Albany Medical Center(AMC), because he had engaged in protected activity by testifying before the Nuclear Regulatory Commission(NRC) on two occasions, and otherwise assisting the NRC in its investigation of violations at the Center. Dr. Kang argues that these acts violated Section 210 of the Act.

AMC argues that the complaint is untimely filed, and that it terminated his employment by notice of November 6, 1991, effective November 29, 1991, for valid, non-discriminatory, and non-pretextual business reasons related to budget problems and inadequate performance by the employee.

ISSUES

- I. Was the complaint timely filed with the U.S. Department of Labor?
- II. Did the Complainant engage in protected whistleblower activity? P>
- III. Was the Complainant terminated for a valid and non- pretextual business reason? P>
- IV. Is the complaint barred under 42 U.S.C. §5851(g) owing to the Complainant's deliberate actions in violation of the Act?

STATEMENT OF FACTS

*. Dr. Kang began with AMC as a resident intern in 1975. (T1- 10).² He was initially hired as a temporary half-time physician in the Nuclear Medicine Service of the hospital, and became a full-time physician in 1978. (T1-11).

*. In 1989, Dr. Kang voluntarily returned to part-time status on

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a 7/8 (7 hours per day) basis to enable him to assist two other hospitals in the community. (T1-19).

*. In October 1989, Dr. Kang was designated as the interim Radiation Safety Officer³ of AMC after the resignation of Robin Hill-Zobel, and was asked to serve in that capacity until an acceptable replacement could be found. Ms. Hill-Zobel had been the full-time RSO for several years. As a physician, Board- certified in nuclear medicine, Dr. Kang was qualified to be RSO. Unlike Ms. Hill-Zobel, Dr. Kang was also the Chief of the

Nuclear Medicine Service and Chairman of the AMC's Radiation Safety Committee while he served as RSO. He did not receive any orientation, training, or additional staff support after becoming RSO, nor was he given any additional time or pay to carry out the additional duties of RSO.

*. In May or June 1990, James Zhang, (a Phd from the Massachusetts Institute of Technology) was hired as the RSO, and began work prior to approval by the NRC. (RX - 28)

*. On November 20, 1990, the NRC conducted an unannounced inspection of AMC. Dr. Kang assigned Dr. Zhang to assist the inspector. The inspection uncovered twenty violations. Later that day Dr. Zhang resigned.

*. On December 13, 1990, the NRC held an enforcement conference at its regional office in King of Prussia, Pennsylvania. (T1- 45)(RX-28). Present from AMC were Dr. Kang, Dr. Flesh(AMC Chief of Staff), Mr. Malphurs(AMC Director), Mary Ellen Piche(Quality Manager), and John D 'Appolito (Health Physics Consultant).

Dr. Kang subsequently explained at the subject hearing that he did "not really understand" his duties as RSO and he was only "acting RSO." (RX-29). Therefore, Dr. Bellamy of the NRC had ordered that the Center hire a safety consultant and more closely oversee the management of radiation safety to keep its NRC operating license. After the meeting, Dr. Kang felt that his higher-ups were not pleased. (T1-51,54). In particular, he thought Dr. Flesh was very unhappy with what he testified to. He testified that someone mentioned that "I talked too much." (RX- 28).

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*. In January 1991, an NRC investigator arrived at AMC. (T1-57- 61). He was summoned by the NRC inspector, who conducted the November 20, 1990 inspection, to investigate the propriety of the sealed-source inventory reports.⁴

*. January 22, 1991, Dr. Kang spoke to Dr. Bellamy via telephone concerning the RSO's responsibilities. Dr. Kang told him "I am sorry to say that I am not quite comfortable to be RSO." (T1-64- 5). That afternoon, Dr. Kang was relieved of his duties as interim RSO and Chairman of the Radiation Safety Committee. Dr. Flesh took over the responsibilities of RSO. Dr. Tsan, Associate Chief of Research, took over as Chair of the Committee.

*. On January 29, 1991, the NRC issued a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$3750.00 for the violations discovered during the November 20, 1990 inspection. (CX-C).

The notice stated in part:

The violations appear to have been caused by the lack of adequate oversight of, and attention to, the radiation safety program at your facility. Although the RSO listed on the license at the time of the inspection was assigned the position in October 1989, it is apparent that he did not clearly understand nor implement his responsibilities under the terms of your license. Furthermore, management did not provide sufficient oversight to assure that the RSO, who was also the Chairman of the Radiation Safety Committee at the time, was actively involved in carrying out his routine responsibilities.

*. In February 1991, Dr. Heravi, formerly Dr. Kang's part-time (three days per week) assisting physician, was promoted to full-time status in the Nuclear Medicine Service at the request of Dr. Flesh. (RX-29). Forty percent of her time was allocated to providing assistance to Dr. Flesh as the RSO.

*. June 1991, David Rhoe was hired as RSO.

Dr. Flesh discussed with Dr. Kang his possible resignation from AMC after the NRC began an investigation of possible wrongdoing on the part of Dr. Kang. (T2-91-2).

*. June 26, 1991, the NRC issued a letter concerning the sealed-

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source inventory records that were the focus of the prior NRC investigation. (RX-18). In the letter, Mr. Knapp, the Director of the NRC Division of Radiation Safety and Safeguards, found that Dr. Kang, as RSO, "falsified certain sealed source inventory records for January, April, July, and October 1990", and that AMC's management was not involved in the falsification. A second enforcement conference was ordered to be held on July 8, 1991, in King of Prussia, Pennsylvania. Both Mr. Malphurs and Dr. Kang were instructed to attend this meeting, and were given the opportunity to bring their own legal counsel. A copy of the letter was sent to Dr. Kang.

*. July 2, 1991, Mr. Malphurs sent a letter to the Veterans Administration Headquarters in Washington, D.C. (VADC) requesting permission to demote Dr. Kang from his position as Chief of the Nuclear Medicine Service to staff physician. (CX-T, RX-19). The reason cited for the action was the NRC charge of falsification of records leveled against Dr. Kang on June 26, 1991.

*. July 8, 1991, Dr. Kang attended the second NRC enforcement conference with his attorney, Mr. Proskin. (RX-28). Mr. Malphurs and Dr. Flesh were also in attendance.

*. August 19, 1991, VADC notified the Center that it had approved the demotion of Dr. Kang. (CX-V).

*. August 21, 1991, Dr. Flesh told Dr. Kang of his impending release as Chief of Nuclear Medicine. (RX-28).

*. August 23, 1991, Mr. Malphurs sent a letter to Dr. Kang officially advising him of his demotion effective August 25, 1991. (RX-22). Dr. Heravi was appointed Chief. (RX-28).

That same day, Mr. Proskin sent a letter to Mr. Malphurs requesting the reasons for Dr. Kang's demotion. (CX-BB). Mr. Proskin wrote "I would greatly appreciate your advising me as to the reasoning that you had presented to Washington (VA)... so that I may determine what, if any, steps are appropriate in regard to his legal position."

*. August 29, 1991, Mr. Malphurs responded to Mr. Proskin by letter to Dr. Kang. (CX-D). He wrote to Dr. Kang that his demotion was based on the following reason: "The Nuclear Regulatory Commission(NRC) has found... that you did not

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implement your responsibilities as Radiation Safety Officer...and falsified certain sealed source inventory records

*. September 19, 1991, Dr. Kang received his annual Proficiency Report, in which he was given his first and only unsatisfactory rating in the category of administrative competence. (CX-Q). The report notes the NRC violations and fines, and the finding of "falsification of records." Dr. Kang claims that this was the first time in his career that he was ever evaluated on "collateral duties" (i.e. when he was Radiation Safety Committee Chair or involved in the Resident Intern Program). (RX-28). The report noted that "Dr. Kang functions well as a Nuclear Medicine physician, but not in his capacity as service chief. After this rating period was over, a decision was made to remove Dr. Kang from the service chief position and to continue him as a part- time staff physician. The next rating period will rate him in this capacity." Dr. Flesh was the rating official. Mr. Malphurs signed in full concurrence.

*. November 4, 1991, the NRC issued its final determination after the July 8, 1991 enforcement conference. (CX-A, B). Mr. Malphurs testified that he received the notice that same day. (T2-31). Dr. Kang did not receive a copy of the report.

The report stated in part:

Notwithstanding the RSO's failures, the failures on the part of the licensee management created a situation in which the RSO did not clearly understand nor properly implement the RSO responsibilities under the terms of the NRC license and did not devote sufficient time to those responsibilities. In 1989, the licensee employed the RSO on a part-time basis (7/8 full time) as the Physician-Director of the nuclear medicine department and yet assigned him the additional duties of

the RSO position, as well as the duties of the Chairman of the RSC, without providing sufficient continuity, oversight, training, and resource support to assure that he adequately discharged these additional duties. Further, licensee management was aware that previously, the duties of the RSO required a full-time position to adequately oversee this

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broad NRC license. These facts demonstrate careless disregard for meeting regulatory requirements on the part of licensee management, which is the root cause of the violations in the enclosed Notice. Violations that involve careless disregard are of significant regulatory concern to NRC.

The NRC imposed a civil penalty of \$2,500.00 for the violations.

*. November 5, 1991, Dr. Lansing was notified of his termination from part-time employment as a physician at AMC effective November 29, 1991.

Mr. Malphurs sent a letter to the NRC in response to the Nov. 4, 1991 report contesting the NRC's findings.

*. November 6, 1991, Dr. Kang was given a notice of termination from employment as a physician, effective November 29, 1991. In pertinent part, it read as follows: "This is to notify you that after a careful review of the needs of this medical center, a decision has been made that your services will no longer be required." (CX-U).

The letter was hand-delivered by Mr. Malphurs at 3:30 P.M.⁵ (RX-26). At the hearing, Mr. Malphurs testified "that the meeting (where I delivered the notice to Dr. Kang) did not go on for very long and, as I recall, maybe seven or eight minutes...." (T2-22-3). However, according to contemporaneously hand-written notes initialed by Mr. Malphurs on the file copy of the termination notice, Mr. Malphurs indicates that he and Dr. Kang discussed the matter until 4:50 P.M.⁶ (Rx-26). Consistent with his testimony at the hearing, Mr. Malphurs also noted for the file that "Dr. Kang wanted to talk about the NRC and his reasons related to his responsibilities in that regard. I told him repeatedly that this was entirely budgetary, that many very tough decisions would have to be made and would be." Mr. Malphurs testified that he did not recall exactly what was discussed, but noted it was nothing of substance.

According to Dr. Kang, Mr. Malphurs told him that "I think you are intentionally trying to make this Institution look bad...."

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[You) purposely didn't do your job. You then... are blaming the Institution(sic) for your wrong doing." (T1-89). When Dr. Kang asked why he was being terminated, Mr. Malphurs allegedly responded, "[w]ell, I wish could fire (you) with what you have done,

but that's not the reason I'm firing you. We just consider all the factors and we cannot no - we no longer don't need you." (T1-90). Dr. Kang testified that during this meeting he was given the option of resigning, when Mr. Malphurs stated, "this is my decision, but if you -- only thing you have option is that you may resign. The final day your working days, November 29, so you still have three weeks. I will wait. If you change your mind, you resign, I will happily accept your resignation. My door is wide open, you can come in anytime to discuss further, but I'll let you know that you have no option -- no other options, you are part-time...." (T1-91).

Although the termination letter did not state any specific reason for termination, Dr. Kang testified that, from the beginning, he "absolutely" felt that the real reason was the problems with the NRC. (T2-154).

That afternoon, Dr. Kang called Mr. Proskin for advice. He also called Dr. Gross, the Director of Nuclear Medicine for VADC. Dr. Gross, Dr. Kang's former supervisor at AMC, was outraged at the action, and told him to seek a six-month extension and then resign. After talking to Dr. Gross, Dr. Kang informed Mr. Proskin of what Dr. Gross suggested. Mr. Proskin told Dr. Kang to wait until he received a response from the letters he was sending to Mr. Malphurs.

*. November 11, 1991 - (Rx33), according to Dr. Kang, Dr. Flesh mentioned that he spoke to Dr. Gross, who had suggested that AMC give Dr. Kang, at least, a few months extension of employment. (T1-93). Dr. Flesh "said he will consider it if I really want to. ... sign on the paper stating that I will voluntarily resign after the end of...those few months...." (T1-93). Dr. Flesh testified to the contrary, stating that after he received the letter, he never offered Dr. Kang any alternatives to termination. (T2-91). However, Dr. Flesh testified that he suggested that Dr. Kang resign prior to the termination decision back in June and July 1991.

*. November 13, 1991, Mr. Proskin sent a letter to Mr. Malphurs declaring that he is representing Dr. Kang in all matters

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relating to the VA. (CX-AA). The letter went on to "demand that Dr. Kang be reinstated, since my investigation has revealed that it is absolutely necessary to have a second physician in Nuclear Medicine, and I believe that your motivation was improper if not illegal. I am very concerned since the only conclusion I can reach for Dr. Kang's dismissal seems to be the report of the NRC which has squarely put the blame for all of the problems on the Administration which is headed by you." The letter continued, "I must point out to you that I am reviewing all avenues in regard to this matter. ... I am investigating legal and other ways to review this matter. I would suggest that in the best interests of the VA Hospital and all concerned, you reinstate Dr. Kang to his original position. I have initiated investigation into various proceedings both administrative and

legal.... I must insist that I receive a response to this letter within four days of the date of this letter. If I do not receive a response, ... I will proceed accordingly."

That same day, Mr. Proskin also sent a letter to Mr. Knapp of the NRC(CX-Y) in which he requested a copy of the NRC Final Determination(November 4, 1991), and stated that "(a)lthough it is only my suspicion at this time, it is my belief that Dr. Kang is, indeed, being punished for standing up and telling the truth to your Agency at the hearing. ... I am going to proceed on behalf of my client to protect his rights and to avoid his being punished for the misdeeds of the Administration of the Albany VA Hospital.

*. November 20, 1991, Mr. Malphurs responded to Mr. Proskin's letter(received November 19, 1991). (CX-X). The letter states:

It is correct that after a careful review of the needs of the Medical Center, which included budgetary constraints, Dr. Kang was notified that his services would not be needed in the future. The termination letter stated this information. Evidently, he refuses to believe this is true. The first determination by the NRC citing errors at this Medical Center, has been accepted. The more recent determination has been accepted by this Medical Center. ... Future response to the concerns of Dr. Kang should be directed to Mr. Douglas Bender, Chief of Personnel Service at this address.

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* November 21, 1991, Mr. Proskin received a letter from Ms. K. Smith of the NRC (Regional Counsel). (CX-Z). She responded to Mr. Proskin's November 13, 1991 letter, and enclosed a copy of the NRC Final Determination(November 4, 1991).

*. Tuesday, November 26, 1991, Dr. Kang testified that since he knew the "end was closing... (and] (he] was kind of desperate. .. (he] went down (to Mr. Malphurs office on the Friday, that was November 26, that was two days before Thanksgiving Day, to request to meet our Director, Mr. Malphurs." (T1-94). Dr. Kang continued, "I went down to see the Mr. Director, he was waiting there about 4:00 o'clock, Friday, he was about to leave... I have to ask some more extension. But how long you need? I said, I will at least I need about six months. He think, well, that may be too long, he says. Well, but still I need about six months. If you sign the paper you will resign voluntarily for end of six months, I will consider it. I'm sorry, Mr. Director, I -- I'm not gonna sign any papers, you have to just trust me. I will find a job in six months and I will resign and leave. He said, -- he was thinking for a while, a few second, he said, I'll let you know, I will -- I will consider it. That was November 26 and Friday around, maybe, close to 5:00 o'clock." (T1-94).

Later, Dr Kang also stated that the he "request(ed]. . .the [November 26th] meeting.... (Mr. Malphurs] did not offer to me that extension. " (T1-145-6).

Mr. Malphurs stated that Dr. Kang came down to see him at about 4 P.M. (on Monday or Tuesday), and "asked me to reconsider the removal notice; said that he would guarantee

that he would resign in six months.... I reiterated that the -- my reasons for the removal were budgetary and that the budgetary problems continued, if not increased, and that if he wanted to talk about the NRC, I'd be delighted to do that, but that that removal notice would stand and I would not reconsider nor entertain his proposal for extending him for six months. We talked, I think, for probably about an hour and a half and at the end of that, he left." (T2- 24-5).

On cross-examination, Mr. Malphurs restated at the hearing that "[Dr. Kang) proposed that I do away with the -- the termination; he be given six months to find a job; and that he would guarantee me that he would resign. (T2-40). When asked if he indicated to

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Dr Kang that he would consider the extension and let him know on the 29th, Mr. Malphurs said "no, I won't consider it." (T2-41).

*. Wednesday, November 27, 1991, Mr. Parkis, Mr. Malphurs' assistant, testified that Dr. Kang met with Mr. Malphurs, but he did not know the details. (T2-126-7). "My understanding was that he asked Mr. Malphurs to change his mind and Mr. Malphurs told me he did not. On Wednesday afternoon, before I went home Mr. Malphurs told me he did not change his mind." (T2-127).

*. Friday, November 29, 1991, Mr. Malphurs was on leave for the day, but was called at home by Mr. Parkis, who asked him if he or Mr. Malphurs should call Dr. Kang. (T2-41). Mr. Parkis reported that "Dr. Kang keeps calling me and says he's waiting to hear something from you." Mr. Malphurs responded, "he's not waiting to hear anything from me, I talked to him on Monday; I am not reconsidering: I did not reconsider; go tell him that."

Mr. Parkis corroborated Mr. Malphurs' account of the events. (T2-125-6).

Dr. Kang reported that until the time Mr. Parkis came to see him, he awaited word from Mr. Malphurs on the extension of his employment. (T1-95).

*. December 11, 1991, DOL Investigator J. Weaver reported in the "Whistleblower Narrative" that the "NRC respond(ed] to Proskin's letter of November 13, 1991, outlining the procedures for filing a complaint under the whistleblower statutes with DOL." (CX-EEE). (The record does not contain the actual response letter from the NRC.)

*. December 24, 1991, Mr. Proskin mailed a letter to the Department of Labor, titled the Complainant's "Formal Complaint under Federal Employee Protection Statutes."

*. December 30, 1991, All of the remaining temporary employees were terminated effective January 31, 1992. (CX-DD-DDD).

FINDINGS AND CONCLUSIONS

I. Timeliness of the Complaint

AMC contends that Dr. Kang's administrative complaint was

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filed untimely and should, therefore, be dismissed as a matter of course.

Section 5851(b) (1) of the Act provides that:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file... a complaint with the Secretary of Labor... alleging such discharge or discrimination.

The regulations pertaining to Federal employee protection statutes, which apply the Act, provide in §24.3(b) that:

Any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint shall be deemed filed as of the date of mailing.

AMC argues that, since Dr. Kang was given notice of his termination on November 6, 1991, but did not file a complaint with DOL until December 24, 1991, it is untimely.

Dr. Kang argues that although he received a notice of termination on November 6, 1991, which, in fact, stated that it was to be effective November 29, 1991, the notice was not final and unequivocal. He maintains that the notice did not become final and unequivocal until November 29, 1991, the date he was formally released from employment and the complaint was filed within 30 days on December 24, 1991.

Generally, in matters involving discrimination under federal statutes, the Supreme Court has held that the date of the alleged violation is the time of the discriminatory act, not the time at which the consequences of the act become painful. *See Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28 (1982); *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980). While the cited opinions concern claims brought under 42 U.S.C. §1983 and Title VII, respectively, the *Ricks-Chardon* rule has been specifically extended to cover claims of discrimination raised under §5851 of the Act. *English v. Whitfield*, 858 F.2d 957 (4th

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Cir. 1988).

The court in *English* held that the filing period for a complaint brought under the Act begins to run on the date the employee was given "final and unequivocal notice of (the) employment decision having delayed consequences. ... Until that time, there is the possibility that the discriminatory decision itself will be revoked, and the contemplated action not taken, thereby preserving the decision status quo." *Id.* at 961 (4th Cir. 1988).

By ruling of May 29, 1992, AMC was denied a summary decision on the ground that there was a possible issue of material fact concerning the "final and unequivocal" nature of the notice given to Dr. Kang.

It is determined that the form of the notice of termination itself was final and unequivocal. There is no warrant to conclude that the document indicated that the decision was conditional or would be subject to any further review, revocation, or change of any kind. The only question concerning finality is what may have occurred or been said at the time Mr. Malphurs delivered the notice to Dr. Kang on November 6, 1991, or during the meeting later in November before Thanksgiving.

The Second Circuit, in whose jurisdiction this matter arises, has held that, in general, "the time periods commence upon the employer's commission of the discriminatory act and are not tolled or delayed pending the employee's realization that the conduct was discriminatory unless the employee was actively misled by his employer, he was prevented in some extraordinary way from exercising his rights, or he asserted his rights in the wrong forum, in which event tolling of the time bar might be permitted as a matter of fairness." *Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985), *cert denied*, 474 U.S. 851 (1985), 106 S.Ct. 148, 88 L.Ed.2d 122 (1985).

This three part test for tolling or delaying statutory time limitations was developed in an earlier Second Circuit case, *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (1978), based on that court's interpretation of the Supreme Court's opinion in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 2, 29, 97 S.Ct 441, 50 L.Ed.2d 427 (1976). The test has been widely applied in numerous cases arising under a number of "whistleblower" statutes, including the ERA. In particular, the

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test was adopted by the Third Circuit in a case under a kindred statute to the ERA, the Toxic Substance Control Act. *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981). Relying on the holding in *School Dist. of Allentown*, the Secretary required the test be applied in a recent Energy Reorganization Act decision at the administrative law judge level. *See Hill v. Tennessee v. Valley Authority*, 87 ERA 23 (July 24, 1991). It must be remembered that, as the court in *School Dist. of Allentown* noted, the three categories are not exclusive, but should be considered as the principal situations where tolling is appropriate. 657 F.2d at 20.

The court defined an "extraordinary" circumstance as one in which "it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory." *Id.*

Since the Secretary has applied this test in cases arising under Federal employee protection statutes including the Act, it is considered to be the appropriate standard to be applied in determining whether to allow equitable relief in this case.

According to Dr. Kang, in the meeting on November 26, 1991, he was, once again, offered the option of resigning if he put it in writing; but this time it came directly from Mr. Malphurs, not Dr. Flesh.⁷ Again, Dr. Hang refused to sign any such agreement.

Under the first prong of the test, if a complainant can show that he was actively misled by the actions of an employer he may be entitled to equitable relief from dismissal of his complaint for untimeliness. "(A)bsent some employer conduct likely to mislead an employee into sleeping on his rights", equitable estoppel should be denied. *Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 966 (4th Cir. 1982).

In *Price*, the Court of Appeals for the Fourth Circuit denied an employee's request for the tolling of the Age Discrimination in Employment Act's thirty-day limitations period on the grounds of estoppel because he did not show that his "failure to file in (a) timely fashion (wa)ls the consequence either of a deliberate design by the employer or of actions that the employer should have unmistakably have understood would cause the employee to delay filing his charge." *Id.* at 965. The court elaborated that an employee's hope for rehiring, transfer, promotion, or a

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continuing employment relationship cannot toll the statute without a showing of some affirmative conduct likely to be relied on by the employee.

Although *Price* is a decision of the Fourth Circuit, it is highly persuasive in light of the fact that it has been applied in a decision of the Southern District of New York, *Pfister v. Allied Corp.*, 539 F.Supp. 224 (S.D.N.Y. 1982), and in *English*, the lead opinion involving the Act's time limitations which has been repeatedly cited as controlling authority by both parties.

In *Pfister*, the court denied equitable relief where there was no allegation that the defendant acted in bad faith or deceitfully lured the plaintiff into settlement discussions, or that it attempted, in any way, to cause the plaintiff to miss the appropriate filing date. The court refused to fault an employer who merely discussed settlement absent any bad faith by that party.

In *English*, the Fourth Circuit denied estoppel where there was no evidence presented to show that the employer acted to deceive, mislead, or coerce the employee into not filing.

The court held that "even an employer's confirmation of (an employee's] hope (for a continuing relationship) could not estop the employer absent some indication that the promise was quid-pro-uo for the employee's forbearance in filing a claim." *English*, 858 F.2d at 963. The court continued, "(the) quid-pro- quo for forbearance from suit. . is the critical element giving rise to estoppel under our rule." *Id.*

Therefore, it is believed that the relevant caselaw establishes that an employee must show reasonable reliance on the deliberate, bad-faith actions of the employer, which were intended to mislead him or he should have unmistakably understood was intended to cause him to forbear from filing a complaint in a timely fashion.

Dr. Kang contends that immediately after receiving the notice of termination, he and AMC engaged in a discussion of alternative methods of resolving the employment dispute short of actual termination. In support, Dr. Kang relies on his talks with Mr. Malphurs on November 6 and about November 26, 1991, in which the issue of his voluntary resignation was discussed, more specifically, at the time the notice was delivered to him at 3:30

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P.M. on November 6, 1991, where Mr. Malphurs allegedly told him, "if you resign, I will happily accept your resignation. My door is wide open, you can come in anytime to discuss further." (TI- 91). As mentioned above, Dr. Kang declined to resign at that time, and immediately called Dr. Milton Gross. Nothing in Dr. Kang's testimony indicates that he told Dr. Gross that he was offered the option of resigning, nor that the option of resigning was ever discussed. Rather, it appears that it was Dr. Gross who thought of resignation instead.

Neither party called Dr. Gross as a witness to corroborate or contradict Dr. Kang's account. Dr. Kang's described exchange with Dr. Gross fails to show that there was any discussion of resignation between Mr. Malphurs and Dr. Kang, and there is no indication that Dr. Gross was speaking on behalf of AMC or the VA when he gave Dr. Kang the advice. Dr. Kang's testimony leads to the view that upon receiving the notice of termination, he sought assistance from his friend, Dr. Gross, to keep from being fired.

After he talked to Dr. Gross on November 6th, Dr. Kang then attempted to contact Mr. Proskin that afternoon. Mr. Proskin's assistant told Dr. Kang not to engage in any form of settlement through resignation, at that time, because it would jeopardize his legal remedies. Dr. Kang was informed that Mr. Proskin would send a letter to Mr. Malphurs, and he should wait until a response is received. Mr. Proskin sent a letter to Mr. Malphurs November 13, 1991.

He testified that Mr. Malphurs said he would consider the extension/resignation but his testimony does not indicate that Mr. Malphurs told him he would give him a definite answer, or when, or if he would, in fact, ever do so. Considering this meeting occurred on

Tuesday, November 26th and he was to be terminated on Friday the 29th, an answer would have had to come the next day or on the 29th because of Thanksgiving on the 28th. (It is possible it was this meeting on November 26 that took only seven or eight minutes which perhaps could explain the discrepancy between Mr. Malphurs testimony and his notations on the termination notice concerning the length of the November 6 meeting with Dr. Kang).

On the 29th, Dr. Kang called Mr. Malphurs a number of times to find out if the extension had been granted. Since Mr. Malphurs was on leave, he was contacted at home by Mr. Parkis who

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asked him whether Dr. Kang should be waiting to hear from him about his employment extension.

Mr. Malphurs testified that he never offered to reconsider his decision, or entertain any alternatives to termination. He repeatedly stated at the hearing that he told Dr. Kang that the entire reason for termination was budgetary, had nothing to do with the NRC, and resignation was not an available option.

There is nothing in the record aside from Dr. Kang's testimony to support his contention that he was offered the option of resigning, or that the employer entertained the idea of extending his employment. There is no reason to question Dr. Kang's credibility, only his power of recall of events and conversations that took place during a very stressful period of time. Had Dr. Kang, in fact, been offered the option on November 6th and 11th⁸ of resigning, the need of asking Mr. Malphurs for "some more extension" on the afternoon of the 26th does not become readily apparent.

There is nothing in Dr. Kang's account or the rest of the record of what transpired after he received the November 6th termination notice to conclude that he was "actively misled", or that he was led into a false sense of security that would justifiably excuse the requirement of filing a complaint within thirty days. He does not allege bad faith on the part of Mr. Malphurs or Dr. Flesh. There is no evidence that either engaged in false negotiations regarding options to the professed reasons for his termination, or that they acted in such a manner as to ensure his forbearance from filing a timely complaint.

The evidence of record establishes that AMC would be operating fiscal year 1992, beginning October 1, 1991, under budgetary constraints and that AMC's staff would have to be, and was, in fact, trimmed by the end of January 1992. Whether or not Dr. Kang had to be one of the first to go or had to be separated at all goes to the merits of his complaint, but the fact that AMC had prepared a budget in August 1991 reduced from the one prepared earlier in April tends to support the position of Mr. Malphurs and Dr. Flesh that, in their minds, as they testified, the termination of Dr. Kang was final.

Further, it seems logical to conclude that the grant of

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permission to resign in six months would not necessarily extend the date of the discriminatory act, and the time to file a complaint, but would only become a face-saving measure postponing the time at which the consequences of the alleged illegal act became painful. Dr. Kang knew by November 6, and certainly not later than November 29, 1991, that he had to leave AMC and according to his own testimony that from the beginning he "absolutely" felt that the reason for his termination was the problems with the NRC.

Dr. Kang's complaint alleges both his removal as Chief of Nuclear Medicine, as well as, his termination as violations of his protected activity and he testified that his problems had been going on since the NRC inspection. (T2-154). He obtained legal assistance as early as July 1991 when he attended the second NRC conference and questions were raised shortly thereafter concerning the reasons for his demotion. There is nothing in the record to show why a reasonably prudent person under the same circumstances would not have filed a complaint as early as the summer of 1991.

In his own mind, Dr. Kang believed he was a victim of discrimination before his notice of termination. He could have acted reasonably in filing a complaint as early as August 1991 and certainly, the entire week after November 29, in time to meet the thirty-day deadline of December 6, 1991.

Upon consideration of the entire record, it is concluded that there is no persuasive evidence to show that Mr. Malphurs or Dr. Flesh so acted as to have misled Dr. Kang and to have caused him to sleep on his right to file a timely claim, nor that there were any extraordinary circumstances which prevented Dr. Kang from filing in time.

The courts, in general, and the Supreme Court, in particular, have been less forgiving to receive late filings where the complainant has simply failed to exercise due diligence in preserving his legal rights. *see Irwin v. Veterans Admin.*, 111 S.Ct. 453 (1990); *Baldwin County Welcome Center v. Brown*, 104 S.Ct 1723 (1984). The Court in *Irwin* explained that Federal courts have extended equitable relief sparingly, and the principles of equitable tolling do not extend to "what is at best a garden variety claim of excusable neglect. " *Id.* at 458.

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In this case, the failure to file in a timely fashion falls short of being excusable or justifiable within those legal precedents.

Based on the evidence of record, testimony of witnesses, and the applicable law, it is found that to be timely the complaint had to be filed with the DOL by the close of

business, December 6, 1991, and the complaint which was filed on December 24, 1991, was, therefore, untimely. Dr. Kang's cause of action is time- barred, and should be dismissed.

Owing to the decision in this matter, the merits of this case and any other issues are not addressed.

RECOMMENDED ORDER

It is recommended that the Secretary of Labor DISMISS this cause of action as being untimely filed.

AARON SILVERMAN
Administrative Law Judge

AS/

[ENDNOTES]

¹ In a May 29, 1992 Order Denying Summary Decision, the complaint was deemed filed on December 23, 1991. Upon further review, it is determined that the correct date should be December 24, 1991, based on the date mailed as postmarked.

² The following abbreviations are used: T1 = Hearing transcript volume 1; T2 = volume 2; CX = Complainant's exhibits; and Rx = Respondent's exhibits.

³ AMC operates under an NRC license to use radioactive substances and materials. The license requires the licensee to designate an NRC-approved and qualified, full-time Radiation Safety Officer to be responsible for all radiation safety matters.

⁴ The RSO is responsible for conducting a quarterly inventory and inspection of the radioactive sources throughout the facility. The results of this inventory are compiled in the sealed-source inventory report which is kept on file at the facility and available for inspection by the NRC.

⁵ Dr. Kang stated that he received a message instructing him to see Mr. Malphurs at 3:00 p.m.

⁶ The notes show that the notice was "hand-delivered by me to Dr. Kang @ 3:30 p.m. 11/6/91. Dr. Kang & I discussed our views until 4:50 p.m."

⁷ There may be some confusion here. As noted above, Dr. Flesh testified that he discussed resignation with Dr. Hang only in June 1991 pending damaging fall-out from the NRC investigation.

⁸ As mentioned above, this relates to the discussion with Dr. Flesh on November 11.